

# **ARBITRATION ADVISORY**

**1998-01**

## **Impact of Arbitration Clauses In Fee Agreements Upon Client's Right to Mandatory Fee Arbitration**

**January 16, 1998**

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### **INTRODUCTION**

Effective January 1, 1997, several important amendments to the attorney-client fee arbitration statutes became effective:

- (a) Arbitration under Business and Professions Code §6200 et seq shall be mandatory for both client and attorney if there is a written arbitration agreement in which the client has agreed to participate in fee arbitration. [§6200(c)]
- (b) A client may elect to stay an arbitration proceeding involving fees which has been initiated in another forum if a timely request is made for Mandatory Fee Arbitration. [§6201(a) and (b)]
- (c) An agreement that the arbitration award be binding is effective only if made after the dispute over fees and/or costs has arisen. [§6204(a)]

On May 5, 1997, the Second District Court of Appeal in Los Angeles rendered its decision in Powers v. Dickson, Carlson & Campillo (1997) 54 Cal.App.4th 1102. Since then, some program administrators have received jurisdictional objections from parties based on a mistaken perception that the Powers case invalidated the January 1, 1997 amendments summarized above. This is not correct.

The following discussion of the Powers case should dispel any argument that the Powers case "invalidated" §6200(c) or §6204(a). The Powers case did not involve a fee dispute. It was a malpractice case:

## DISCUSSION

In Powers, plaintiffs sued their former attorneys for malpractice. The Defendants petitioned the Superior Court for an order compelling arbitration on the basis of the following text of an arbitration clause in their fee agreement:

"If any dispute arises out of, or related to, a claimed breach of this agreement, the professional services rendered by [Attorney] or Client's failure to pay fees for professional services and other expenses specified, or any other disagreement of any nature, type or description regardless of the facts or the legal theories which may be involved, such dispute shall be resolved by arbitration before the American Arbitration Association by a single arbitrator in accordance with the Commercial Rules of the American Arbitration [Association] in effect [at] the time the proceeding is initiated. The hearing shall be held in the Los Angeles offices of the American Arbitration Association and each side shall bear his/their own costs and attorney fees."

The question before the Court of Appeal was whether this arbitration clause was enforceable and could be used by the attorneys to compel the client to participate in arbitration of the malpractice claims. The clients in this case were sophisticated clients who had substantial prior arbitration experience. The clients contended that they did not know they were giving up the right to jury trial. The Court of Appeal concluded that the clause was enforceable. It found that the arbitration clause unambiguously included malpractice claims and that the contract had been specifically negotiated between the parties. The Powers court reached the following conclusions:

- (a) There is nothing ethically improper about an attorney having an arbitration clause in the initial fee agreement (provided it is not a contract of adhesion);
- (b) No conflict of interest rules were applicable to the arbitration clause, so that strict scrutiny of the fee agreement and the arbitration clause was not required;
- (c) The clause was not ambiguous, so construction of ambiguity against the drafter was not required;
- (d) Code of Civil Procedure § 1295 is not applicable to attorney's fee contracts [i.e. bold or red-colored print of the arbitration provision was not required]; and
- (e) The fee contract was not required to contain an express waiver of jury trial.

The arbitration clause addressed by the Court in the Powers case did not purport to make the award of the arbitrators binding. An earlier version of the retainer agreement provided that the award in any disputes, including fee disputes, would be binding. The Court did not address the binding versus non-binding aspect of this earlier version of the arbitration clause. The Court further did not address whether such a binding clause would be enforceable for purposes of a fee dispute. The Court stated: "The arbitration provisions in this case are enforceable as to legal malpractice claims". [Powers, supra, 54 Cal.App.4th at 1115]

All of the above findings dealt with the validity of the arbitration clause for purposes of a malpractice dispute, not for fee arbitration. The case dealt with interpretation of a fee agreement which was written years prior to the 1997 amendments to § 6200 et seq. of the Business and

Professions Code. Since the case did not involve a fee dispute and did not even consider the statutory provisions of Business and Professions Code § 6200 et seq., it is the opinion of the Committee on Mandatory Fee Arbitration that the Powers case has no impact on the Mandatory Fee Arbitration Program and does not alter the statutory provisions now in effect.

The statute clearly requires that (a) fee arbitration is non-binding unless an agreement to make it binding was made after the fee dispute arose; (b) fee arbitration is not mandatory for the client unless the client has agreed in writing; and (c) regardless of a contractual provision for arbitration before another program, the client has the right to stay other proceedings and proceed with Mandatory Fee Arbitration, if timely requested.

It is the opinion of the Committee that the Powers decision has no impact on jurisdiction in Mandatory Fee Arbitration cases.